

**FEDERAL ELECTION COMMISSION**

**FIRST GENERAL COUNSEL'S REPORT**

**MUR 7508**

DATE COMPLAINT FILED: Oct. 5, 2018,

DATE OF NOTIFICATIONS: Oct. 12, 2018

DATE OF LAST RESPONSE: Dec. 6, 2019

DATE ACTIVATED: Mar. 19, 2019

EXPIRATION OF SOL: Sept. 25, 2023

ELECTION CYCLE: 2018

**COMPLAINANT:**

Robert Secaur

**RESPONDENTS:**

Friends of Sherrod Brown and Judith Zamore  
in her official capacity as treasurer  
Whirlpool Corporation

**RELEVANT STATUTES  
AND REGULATIONS:**

52 U.S.C. § 30118(a)  
11 C.F.R. § 100.52(d)  
11 C.F.R. § 114.2

**INTERNAL REPORTS CHECKED:** None

**FEDERAL AGENCIES CHECKED:** None

**I. INTRODUCTION**

The Complaint in this matter alleges that Friends of Sherrod Brown and Judith Zamore in her official capacity as treasurer (the "Committee") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations by accepting a prohibited in-kind corporate contribution from Whirlpool Corporation ("Whirlpool") by using the Whirlpool logo and corporate resources in the form of Whirlpool employees in a Committee campaign advertisement.

The Committee and Whirlpool respond by stating that Whirlpool did not provide anything of value to the Committee because the advertisement was filmed on public property,

1 used publicly available footage, and featured employees appearing in their personal capacities on  
2 their personal time. Respondents also state that Whirlpool promptly sought and received a  
3 statement in the advertisement clarifying that the ad did not amount to an endorsement by  
4 Whirlpool.

5 Based on the available information, we conclude that the Complaint does not raise a  
6 reasonable inference that Whirlpool made, and the Committee accepted, a prohibited corporate  
7 contribution. Accordingly, we recommend that the Commission dismiss the allegations that  
8 Whirlpool and Friends of Sherrod Brown and Judith Zamore in her official capacity as treasurer  
9 violated 52 U.S.C. § 30118(a) by making or receiving a prohibited corporate contribution.

## 10 II. FACTUAL BACKGROUND

11 Sherrod Brown is the senior U.S. Senator from Ohio, and was a candidate for re-election  
12 in 2018.<sup>1</sup> Whirlpool is a global corporation with a presence in Ohio, employing approximately  
13 10,000 individuals at five manufacturing facilities in Ohio.<sup>2</sup> On September 25, 2018, the  
14 Committee released a campaign advertisement on YouTube entitled “Disheveled” that features  
15 several individuals, whom Whirlpool has confirmed are employees, wearing Whirlpool-branded  
16 clothing and reading press quotations concerning Brown’s appearance.<sup>3</sup> The individuals are then  
17 shown together in front of a Whirlpool sign and one employee states, “We make washing  
18 machines and Sherrod Brown looks great to us.”<sup>4</sup> Next, the advertisement overlays quotes

<sup>1</sup> See Compl. at 1 (Oct. 5, 2018).

<sup>2</sup> Whirlpool Resp. at 1 (Dec. 6, 2018).

<sup>3</sup> Committee Resp. at 2 n. 4 (Dec. 3, 2018) (citing Friends of Sherrod Brown, *Disheveled*, YOUTUBE (Sept. 26, 2018), <https://www.youtube.com/watch?v=AoKgb-jVCjU>) (“Disheveled Advertisement”).

<sup>4</sup> *Id.*

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1 concerning Brown's efforts for Whirlpool workers with Whirlpool factory footage.<sup>5</sup> At the end  
2 of the advertisement, Brown is shown standing on a sidewalk in front of a Whirlpool sign while  
3 the employees who had been featured earlier in the advertisement walk on the sidewalk behind  
4 him, compliment his appearance, and give him a "thumbs up."<sup>6</sup>

5 Beginning on the day after the advertisement was first released, on September 26, 2018,  
6 the advertisement began to include the statement: "THIS AD DOES NOT CONSTITUTE AN  
7 ENDORSEMENT OF WHIRLPOOL CORPORATION."<sup>7</sup> On September 27, 2018, several Ohio  
8 news outlets published stories concerning Whirlpool's requests that Brown alter the  
9 advertisement, and quoted Whirlpool's statement that "Whirlpool Corporation does not endorse  
10 candidates running for political office."<sup>8</sup>

11 The Complaint asserts that the Committee's advertisement was intended to imply that  
12 Whirlpool endorsed and supported Brown's campaign.<sup>9</sup> The Complaint further argues that the  
13 Committee's addition of a statement indicating that Whirlpool was not endorsing Brown does  
14 not diminish the value that Whirlpool allegedly conveyed to the Committee through the use of  
15 Whirlpool trademarks that remained in the advertisement.<sup>10</sup> The Complaint alleges

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<sup>5</sup> Committee Resp. at 2.

<sup>6</sup> Disheveled Advertisement.

<sup>7</sup> *Id.* at 0:05.

<sup>8</sup> See Compl. at 1 (citing Will Garbe, *Whirlpool asks Sen. Sherrod Brown to Change New Ad*, WHIO-TV7, Sept. 27, 2018, <https://www.whio.com/news/local-govt--politics/whirlpool-asks-sen-sherrod-brown-change-new/ZjXr8JOfmptb240Case7EN/>).

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.*

1 that, as a result, the Committee accepted a prohibited corporate contribution from Whirlpool  
2 through the use of the company name and logo in its ad.<sup>11</sup>

3 In its Response, the Committee states that Whirlpool did not make any contributions to  
4 the advertisement and contends that the employees filmed the advertisement on their personal  
5 time, and did so of their own volition.<sup>12</sup> The Committee's Response also states that the  
6 advertisement was filmed on public property and all factory footage used was obtained from  
7 publicly available YouTube videos.<sup>13</sup> The Committee contends that filming the advertisement  
8 solely entailed activity that the Commission has previously found to be acceptable or that it has  
9 declined to regulate.<sup>14</sup> Finally, the Committee asserts that the Complaint's reliance on Advisory  
10 Opinion 2007-10 is misplaced because the Committee did not use corporate logos in order to  
11 facilitate contributions.<sup>15</sup>

12 Similarly, in its Response, Whirlpool asserts that it "in no way offered or allowed Friends  
13 of Sherrod Brown to use the Whirlpool name and logo."<sup>16</sup> Whirlpool states that, consistent with  
14 its policies, it refused to allow the Committee to film on Whirlpool's private property, that the  
15 Whirlpool building logo is visible from public property, and that any Whirlpool employees who

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<sup>11</sup> *See id.*

<sup>12</sup> Committee's Resp. at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2-4.

<sup>15</sup> *Id.* at 5. The Complaint relies on an advisory opinion in which the Commission found that a committee was not allowed to "display the corporate names, trademarks, or service marks to increase participation in [a federal committee] fundraiser." Advisory Op. 2007-10 at 2 (Reyes) ("AO 2007-10") (Aug. 21, 2007). The Committee contends that the Complaint's reliance on the advisory opinion is "misplaced" because the advisory opinion focused on the use of corporate resources to facilitate contributions. Committee's Resp. at 5.

<sup>16</sup> Whirlpool Resp. at 2.

1 appear in the advertisement did so in their individual capacities.<sup>17</sup> Whirlpool also asserts that the  
2 employees chose the attire they wore to film the ad.<sup>18</sup> Whirlpool argues that because it did not  
3 provide anything to the Committee, there was no corporate contribution.<sup>19</sup> Like the Committee,  
4 Whirlpool argues that the Complaint's reliance on Advisory Opinion 2007-10 is inapposite,  
5 claiming that other advisory opinions more appropriately address the employees' participation in  
6 the advertisement.<sup>20</sup> Finally, Whirlpool notes that it took steps to clarify that Whirlpool had not  
7 endorsed Brown by demanding that the Committee insert a statement in its advertisement that  
8 Whirlpool was not endorsing Sherrod Brown and by making statements to the press confirming  
9 that there had been no endorsement.<sup>21</sup>

### 10 III. LEGAL ANALYSIS

11 The Act and Commission regulations define "contribution" as "any gift, subscription,  
12 loan, advance, or deposit of money or anything of value made by any person for the purpose of  
13 influencing any election for Federal office."<sup>22</sup> "Anything of value" includes all in-kind  
14 contributions, defined as the provision of any goods or services without charge or at a charge that

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.* (citing Advisory Op. 1984-43 (Brunswick Corporation) ("AO 1984-43") (approving proposal for corporate employee to appear in a campaign advertisement provided that the employee volunteer his or her time); Advisory Op. 1978-77 (Aspin) ("AO 1978-77") (finding that identification of a corporate officer by his or her corporate position in a campaign advertisement would not constitute a corporate contribution)).

<sup>21</sup> *Id.* at 2-3.

<sup>22</sup> 52 U.S.C. § 30101(8)(A)(i); *see also id.* § 30118(b)(2) (defining "contribution" to include "any direct or indirect payment, distribution, loan advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section").

1 is less than the usual and normal charge for such goods or services.<sup>23</sup> Corporations are  
2 prohibited from making contributions or expenditures to candidates and their authorized  
3 committees.<sup>24</sup> The Act also prohibits candidates from knowingly accepting or receiving any  
4 corporate contribution.<sup>25</sup> A corporate trademark could be "something of value that the  
5 corporation was providing to the campaign," and use of a corporate trademark in a campaign  
6 advertisement may constitute an in-kind contribution.<sup>26</sup>

7 The Commission has previously concluded that the use of endorsers who are identified  
8 by their corporate positions in campaign advertisements would not violate the Act provided that  
9 the corporate employee volunteers his or her time and the campaign pays for all advertisement  
10 expenses.<sup>27</sup> Both Whirlpool and the Committee state that all Whirlpool employees who  
11 appeared in the advertisement at issue appeared on their own time,<sup>28</sup> and there does not appear to  
12 be any contrary information in the available record. Thus, in accordance with the Commission's  
13 advisory opinions, it does not appear that Whirlpool facilitated a corporate contribution in the  
14 form of employee time.

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<sup>23</sup> 11 C.F.R. § 100.52(d)(1).

<sup>24</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

<sup>25</sup> 52 U.S.C. § 30118(a).

<sup>26</sup> See First General Counsel's Report at 5, MUR 5578 (Wetterling *et al.*) (quoting MUR 4340 (TWEEZERMANN)).

<sup>27</sup> AO 1978-77 (permitting corporate employee to provide volunteer services for campaign radio advertisement in which no corporate or personal funds were used); AO 1984-43 (permitting corporate employee to appear in campaign television advertisement which discussed candidate's support for industry and which was wholly paid for by campaign).

<sup>28</sup> Whirlpool Resp. at 2.

1 The Commission has also previously determined that a corporation's name, trade name,  
2 trademarks, and service marks are things of value owned by the corporation, and that allowing a  
3 committee to use them in a manner suggesting the corporation's support or endorsement of a  
4 candidate may constitute an in-kind contribution.<sup>29</sup> However, those matters involved authorized  
5 uses of trademarks and the Commission has found that the resulting value of in-kind  
6 contributions from such use of a corporation's name or mark were likely *de minimis*.<sup>30</sup>

7 The Whirlpool trademarks are featured prominently in the advertisement at issue and may  
8 have had some value, but there is no indication in the record that Whirlpool authorized the  
9 Committee to use its name and logo.<sup>31</sup> According to Whirlpool, the Whirlpool employees  
10 featured in the advertisement selected their Whirlpool-branded attire without input from  
11 Whirlpool.<sup>32</sup> The Whirlpool building logo featured in the advertisement is plainly visible from  
12 what appears to be a public street where Brown and the Whirlpool employees can be seen  
13 standing outside a fenced facility.<sup>33</sup> Indeed, the available information indicates that Whirlpool  
14 specifically refused to approve the Committee's request to film on Whirlpool's property and

<sup>29</sup> Factual and Legal Analysis at 4, MUR 7302 (Tom Campbell for North Dakota, *et al.*) ("F&LA") (citing AO 2007-10; F&LA at 7, MUR 6542 (Mullin for Congress); F&LA at 10-11, MUR 6110 (Obama Victory Fund)).

<sup>30</sup> F&LA at 5, MUR 7302; *see also* F&LA at 7, MUR 6542 (dismissing allegations that the committee accepted prohibited in-kind corporate contributions where committee paid for advertisements that featured the name and logo of the candidate's business); MURs 6287, 6288, and 6297 (Liberators for Congress) (EPS dismissal based on determination that the value of a possible in-kind contribution associated with inclusion of a corporate logo on a campaign mailer was likely *de minimis*).

<sup>31</sup> *See* F&LA at 3-4, MUR 7457 (Theresa Gasper for Congress, *et al.*) (finding no reason to believe a violation occurred where a candidate's flyer implied endorsement by five universities but where there was no indication that the universities had actually endorsed the candidate or coordinated with the candidate and the flyer only circulated for 24 hours); MUR 6331 (Gibson, *et al.*) (EPS dismissal noting that *authorized* use of corporate logos could constitute a corporate in-kind contribution).

<sup>32</sup> Whirlpool Resp. at 2.

<sup>33</sup> *See* Disheveled Advertisement at 0:05-0:12, 0:22-0:30.

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1 requested that the Committee clarify that the appearance of the Whirlpool logo and the presence  
2 of employees in the Committee's ad did not amount to an endorsement by Whirlpool. Whirlpool  
3 also publicly stated that the company was not endorsing Brown.<sup>34</sup> Given Whirlpool's attempt to  
4 alleviate potential confusion concerning the corporation's authorization of the advertisement, and  
5 given the Commission's prior decisions to dismiss similar actions, the available record does not  
6 support a reasonable inference that Whirlpool made, and the Committee accepted, a prohibited  
7 corporate contribution.<sup>35</sup>

8 In light of these facts, we recommend that the Commission dismiss the allegation that  
9 Whirlpool Corporation and Friends of Sherrod Brown and Judith Zamore in her official capacity  
10 as treasurer violated 52 U.S.C. § 30118(a) and close the file.

#### 11 RECOMMENDATIONS

- 12 1. Dismiss the allegation that Whirlpool Corporation violated 52 U.S.C. § 30118(a) by  
13 making a prohibited contribution;
- 14 2. Dismiss the allegation that Friends of Sherrod Brown and Judith Zamore in her  
15 official capacity as treasurer violated 52 U.S.C. § 30118(a) by accepting a prohibited  
16 corporate contribution;
- 17 3. Approve the attached Factual and Legal Analysis;
- 18 4. Approve the appropriate letters;

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<sup>34</sup> See Disheveled Advertisement beginning at 0:05; Compl. at 1 (citing Will Garbe, *Whirlpool asks Sen. Sherrod Brown to change new ad*, WHIO-TV7, Sept. 27, 2018, <https://www.whio.com/news/local-govt--politics/whirlpool-asks-sen-sherrod-brown-change-new/ZjXr8JOfmptb240Case7EN/>).

<sup>35</sup> See F&LA at 3-4, MUR 7457. *C.f.*, F&LA at 8, MUR 6218 (Ball4NY, *et al.*) (dismissing claims that a committee accepted corporate contributions by including the names of two corporations in publicity mistakenly and without the corporations' consent).



5. Close the file.

Lisa J. Stevenson  
Acting General Counsel

June 17, 2019  
Date

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